FILE COPY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939

No. 590

HERMAN H. HAGNER and JULIA C. HAGNER,

*Petitioners,*

vs.

THE UNITED STATES OF AMERICA,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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HERMAN O. HAGNER and JULIA C. HAGNER,

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioners, Herman O. Hagner and Julia C. Hagner, respectfully apply for the allowance of a writ of certiorari to review a decision of the Court of Appeals

of the District of Columbia rendered November 23, 1931, a petition for rehearing having been denied by said Court on December 5, 1931 (R. 19-20).

## QUESTIONS PRESENTED.

1. Petitioners herein were indicted in the Supreme Court of the District of Columbia for using the mails to defraud in violation of Sec. 215, Penal Code, U. S. The Court below squarely held that while the indictment charged no offense to have been committed in the District of Columbia, and defendants "were not triable under it in the latter place" (R. 14-15), yet, having pleaded not guilty (though regularly moving in arrest of judgment), they must be deemed to have "waived" their "right" to be tried in Pennsylvania (wherein the indictment charged the commission of the offense, as held by the Court below). This case therefore presents for the first time the question whether a defendant can by implication "waive" the requirements of Article III, Sec. 2 of the Constitution that the trial of crimes "shall be by jury; * * * * in the State where the said crimes shall have been committed," and the provisions of the Sixth Amendment that the accused "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

2. A second question is presented: even if, under the doctrine of *Patton* v. *U. S.*, 281 U. S. 276 (wherein a jury of twelve was waived), the defendants could "waive" their "right" to be tried in Pennsylvania, has the Supreme Court of the District of Columbia ju-

risdiction to try defendants for crimes committed in Pennsylvania (or in Maine, New Mexico, or California), on the ground that under Sec. 24, Judicial Code, the Supreme Court of the District of Columbia has the *territorial jurisdiction* of all the District Courts in the United States, there being, as the Court below held, no Federal venue statute, but only the Constitutional requirements which defendants could "waive."

In this connection, it may even be questioned whether Congress *could,* Constitutionally, confer on the Supreme Court of the District of Columbia power to try offenders for crimes committed in the various States, the grant of judicial power to the Supreme Court of the District of Columbia being derived from the Constitution Art. I, Sec. 8, Clause 17, giving Congress exclusive legislative power over the District containing the Seat of Government. The power to try accused persons for offenses committed in the various states certainly seems to bear no reasonable relationship to the government of the District of Columbia.

3. Thirdly, this case presents the question whether, by a so-called "waiver," a defendant can confer extra-territorial jurisdiction upon the Supreme Court of the District of Columbia when its criminal jurisdiction is expressly limited by Sec. 44, Title 18, D. C. Code to "crimes and offenses *committed within said District.*" Sec. 43 seems clearly limited by Sec. 44, though the Court below has impliedly so construed these sections as to arrive at the opposite conclusion.

## STATEMENT OF FACTS.

Defendants herein were indicted and tried in the Supreme Court of the District of Columbia for violat-

ing Section 215, United States Criminal Code (U. S. C. A., Tit. 18, Sec. 338). The indictment, after describing an alleged scheme and artifice to defraud, averred that the defendants, for the purpose of executing said scheme and artifice, did place and cause to be placed in the post office at the City of Scranton, in the State of Pennsylvania, to be sent and delivered by the post office establishment of the United States, certain described mail matter. The indictment did not charge that the defendants had knowingly caused such matter to be delivered in the District of Columbia (R. 1-3).

A jury found defendants guilty and thereupon they moved in arrest of judgment, which motion was denied (R. 4). An appeal was taken to the Court of Appeals of the District of Columbia. That Court, while holding the indictment charged no offense to have been committed in the District of Columbia (R. 14-15), affirmed the judgment of conviction on the authority of *Patton* v. *U. S.*, 281 U. S. 276, and held that the defendants had as completely agreed to waive "their Constitutional privilege to refuse to be tried in the District of Columbia" as though their "waiver" were in express words; and that defendants might not, by Motion in Arrest of Judgment, point out the lack of the court's jurisdiction (R. 17-18).

## REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The decision below obviously determines important questions of constitutional law. It by no means follows from this Court's decision in *Patton* v. *U. S.*, *supra*, permitting an express and intelligent waiver of

the regulation jury of twelve, that *all* constitutional provisions may be waived, including the requirements of Article III, Sec. 2 and Amendment Six. Conceding, *arguendo*, that as said by the Court below "there is nothing to prevent the enactment by Congress of a law permitting and providing for the trial of criminal cases anywhere in the United States" it is in the highest degree unlikely that Congress has already done so. In fact, the history of Congressional legislation in this country for over a hundred years shows a scrupulous care on the part of Congress clearly to delimit and define the territorial jurisdiction of each Judicial District. It is altogether surprising to counsel to hear it said by any Court that because Sec. 24 of the Judicial Code confers on the district courts jurisdiction of "all crimes and offenses cognizable under the authority of the United States," the Supreme Court of the District of Columbia has jurisdiction of crimes and offenses committed in any state in the Union. It seems obvious that "jurisdiction" in Sec. 24, Judicial Code, and Sec. 43, Title 18, D. C. Code, refers to jurisdiction of the *subject-matter*, not to *territorial jurisdiction*. The *territorial jurisdiction* of the District Courts is set forth in the statutes geographically defining the various Judicial Districts (Judicial Code, Sec. 69-116). The territorial jurisdiction of the Supreme Court of the District of Columbia is set forth, equally clearly, in Sec. 44, Title 18, D. C. Code. There is certainly no way for a defendant to "waive" jurisdiction of a Federal Court in the sense of adding territory beyond the confines provided by Statute; nor can a defendant, by any form of waiver, confer jurisdiction where without it none exists.

2. There is a conflict of decision between that of the

Court below and the decision of this Court in *Salinger* v. *Loisel*, 265 U. S. 224, condemning the attempted trial of offenders in a district other than the district wherein the crime was committed, and the decision of this Court in *Ex parte Bradley*, 7 Wall. 364, to the effect that the criminal jurisdiction of the Supreme Court of the District of Columbia is limited to the trial of crimes and offenses committed in that District.

*WHEREFORE* your petitioners pray the allowance of a writ of certiorari to the Court of Appeals of the District of Columbia in this cause, there entitled Herman O. Hagner and Julia C. Hagner, Appellants, v. United States, Appellee, No. 5410, that said cause may be reviewed and determined by this Court, and that the judgment of the said Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

HERMAN O. HAGNER,
JULIA C. HAGNER,
*Petitioners.*

LUCIAN H. VANDOREN,
*Attorney for Petitioners.*

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
*Of Counsel.*

## BRIEF IN SUPPORT OF PETITION.

### JURISDICTION.

The judgment of the Court of Appeals was entered November 23, 1931 (R. 19), a petition for rehearing being denied December 5, 1931 (R. 20).

Jurisdiction of this Court to review the judgment below is invoked under Section 240-a of the Judicial Code.

The opinion of the Court below is not yet reported.

### ARGUMENT

The Court below squarely held, citing authorities, that the indictment herein charged no offense to have been committed in the District of Columbia (R. 14-15). At the same time it held defendants triable therein. (R. 19.)

In order to sustain the validity of this decision it is necessary to hold:

(1) That defendants be deemed capable of "waiving" the requirements of Article III, Section 2 and Amendment 6 of the Constitution of the United States relative to trial by a jury of the state and district wherein the offense was committed;

(2) That defendants in the present case have in fact "waived" their "right" to be tried in Pennsylvania;

(3) That the Supreme Court of the District of Columbia has *territorial jurisdiction* over offenses committed in Pennsylvania.

It is obvious that, even conceding (1) and (2), above, it is essential to the validity of the judgment below

that Congress shall have conferred jurisdiction on the Supreme Court of the District of Columbia over offenses committed in Pennsylvania instead of having, as counsel contend, strictly limited the criminal jurisdiction of the Supreme Court of the District of Columbia to "crimes and offenses *committed within said District*" (Sec. 44, Title 18, D. C. Code). It may be gravely questioned whether Congress has, under the Constitution, any such power to confer upon the Supreme Court of the District of Columbia jurisdiction over offenses committed in Pennsylvania, the power of Congress to legislate for the District of Columbia being conferred by the Constitution, Article I, Section 8, Clause 17, giving it power to enact all necessary legislation for the government of said district. There would seem to be grave doubt whether the power to try accused persons in the District of Columbia for offenses committed in Pennsylvania bears any reasonable relationship to the government of the District of Columbia.

## I.

### The Constitutional Requirements of Article III, Section 2, and Amendment 6, Relative to Trial by a Jury of the State and District Wherein the Offense Was Committed, Cannot Be "Waived."

The Court below seems to have taken for granted that because this Court held, in *Patton* v. *U. S.*, 281 U. S. 276, that a defendant by an express and intelligent waiver could constitutionally waive his right to be tried by a full jury of twelve, that a defendant likewise can be inferred to "waive" his "right" to be

tried by an impartial jury in the state and in the district wherein the crime has been committed, which district shall have been previously ascertained by law. The constitutional provisions are as follows:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed", (Article III, Section 2).
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law" (Amendment 6).

There is no question in the present case of the application of the above sections to the District of Columbia for the reason that the indictment alleges the offense was committed in Pennsylvania, and the Court below so held. There is, therefore, squarely presented the question whether these constitutional provisions are not mandatory upon the Government. The Court below held, on the authority of *Patton* v. *U. S., supra,* that they could be waived. If so, there is a clear conflict of decision between *Patton* v. *U. S., supra,* and *Salinger* v. *Loisel,* 265 U. S. 224, 69 L. Ed. 989, wherein this Court said:

> "It must be conceded that, under the 6th Amendment to the Constitution, the accused cannot be tried in one district on an indictment showing that the offense was not committed in that district."

There are several indications that the provisions of

Article III, Section 2, above, cannot be waived. The words "and such trial shall be held in the state where the said crimes shall have been committed" are clearly directed to the Government and not to the defendant. They constitute a limitation upon the powers of the Government with reference to place of trial, instead of conferring, as held below, an option upon the defendant. If they be interpreted to mean that a "right" is accorded the defendant, an enigma is presented as to how the defendant may avail himself of that "right." It should be noted that the provision states "where the said crimes shall have been committed," not where the said crimes shall be *alleged* to have been committed. If, therefore, this provision be interpreted as conferring a waivable right upon a defendant it leads to the conclusion that he must confess his crime before he can assert the right. Certainly no such construction seems reasonable in view of other provisions of the Constitution prohibiting compulsory self-incrimination. It is illogical to suppose that a defendant must give up one right under the Constitution in order to assert another.

The provisions of the 6th Amendment are likewise mandatory as to the place where the trial shall be had. They are likewise directed to the Government in the form of a limitation upon Governmental power. The words, "the accused shall enjoy the right to * * * trial by an impartial jury of the state and district wherein the crime shall have been committed," prescribe not merely the place of trial, but the source of the jury by which the accused shall be tried. The words, "which district shall have been previously ascertained by law," are a further indication that this requirement operates retrospectively upon the Government, instead

of conferring a mere privilege upon the defendant. In fact this provision of the Constitution must be violated by the Government before a defendant would ever be in a position wherein he would be required to assert his right.

The statement by the Court below that there is no Federal venue statute is no aid to that Court in its opinion. The obvious reason why no Federal criminal venue statute exists is the clear and explicit provisions of the Constitution. Congress never thought it necessary that any statute should be passed further safeguarding provisions of the Constitution which seem so clear that they are self-sufficient. Certainly until the present case no one imagined that any Federal Court could exercise a criminal jurisdiction beyond the confines of the judicial district wherein it was located, in the case of the District courts, or beyond the District of Columbia in the case of the Supreme Court of the District of Columbia.

## II.

### Defendants Have Not, in the Present Case, "Waived" Their "Right" To Be Tried in Pennsylvania.

As indicated in discussing the last point, either the constitutional provisions relative to trial in the state and district wherein the offense was committed are binding upon the Government, or they are a nullity. There is no way in which a defendant can assert any so-called "right" to be tried in the state "wherein the crime was committed." If the constitutional provisions be considered to confer a waivable right, necessarily the defendant must assert such right within the

terms of the constitutional grant. This means in the instant case that he must make clear to the court, in some way not disclosed by the court below, that the offense was committed in Pennsylvania.

The Patton case, counsel submit, is no authority for the decision below. In the Patton case there was an express and intelligent waiver; in the present case there is an alleged waiver by implication and, counsel submit, a strained implication. There is nothing in the Patton case tending to indicate that this Court intended to overrule its previous decision in *Thompson* v. *Utah*, 170 U. S. 353, 42 L. Ed. 1067, to the effect that a defendant could not by mere silence waive the requirement of a constitutional jury of twelve. With reference to *Thompson* v. *Utah*, *supra*, this court said, in *Patton* v. *U. S.*, *supra*:

> "The case involved the validity of a statute dispensing with the common-law jury of twelve and providing for trial by a jury of eight. There was no contention that the defendant, Thompson, had consented to the trial, *but only that he had not objected until after verdict.* The effect of an express consent on his part to a trial by a jury of eight was not involved—indeed he had been silent only under constraint of the statute" (*Patton* v. *U. S.*, 281 U. S. 276, 293).

It may be noted that in the present case the defendants, as in *Thompson* v. *Utah*, did not consent to the trial, but only did not object until after the verdict (R. 4).

The last paragraph of this Court's opinion in the *Patton* case, containing as it does a caution against Federal courts accepting, without careful considera-

tion, indiscriminate waivers of constitutional rights, is likewise pertinent to the present case wherein the defendants literally did not know they possessed the "right" the Court of Appeals has now held they waived. In addition, it should be remembered that the trial of the present case was concluded prior to the decision of this Court in *Patton* v. *U. S.*, *supra*, and at a time when defendants had a right to rely upon their constitutional rights as they then were interpreted; when, in fact, as the law stood at the date of the trial herein, it was impossible for a defendant to "waive" the constitutional rights herein involved.

## III.

### Even if Defendants Can Waive and Have Waived Their Right To Be Tried in Pennsylvania, the Supreme Court of the District of Columbia Has No Jurisdiction To Try Them for an Offense Committed in That State.

The Court below in its decision overlooks the distinction between *venue* and the *territorial jurisdiction* of the Supreme Court of the District of Columbia. It is petitioners' claim that the jurisdiction of that court is territorially limited, by a specific statute, not noticed by the court below in its opinion, to crimes and offenses *committed in the District of Columbia.*

If so territorially limited, there is no way for petitioners to "waive" their "right" to be tried in Pennsylvania for the reason that the Supreme Court of the District of Columbia would have no jurisdiction, waiver or no waiver, due to the absolute lack of a statutory

grant of judicial power. No authorities are needed to show that a defendant in a criminal case cannot "waive" jurisdiction in the sense of adding territory to the jurisdiction of a Federal court beyond the confines provided by statute.

Pertinent statutes are as follows:

The Code of the District of Columbia (completed to March 4, 1929), title 18, sec. 43 provides:

> "43—*Jurisdiction; Powers of Circuit and District Courts Conferred.*—The said Court shall possess the same powers and exercise the same jurisdiction as the District courts of the United States, and shall be deemed a Court of the United States." (Mar. 3, 1863, 12 Stat. c. 91; Mar. 3, 1901, 31 Stat. 1199, c. 854, Sec. 61; June 30, 1902, 32 Stat. 522, c. 1329; March 3, 1911, 36 Stat. 1166, c. 231, sec. 289.)
>
> "44. *Same; General Jurisdiction.*—Said court, except as otherwise provided in this title, shall have cognizance of all crimes and offenses *committed within said District* and of all cases in law and equity between parties, * * * *."

Sec. 44 specifically limits the criminal jurisdiction of the Supreme Court of the District of Columbia to "crimes and offenses committed within said District." The words "except as otherwise provided in this title" in Sec. 44 above, are not found in any of the Acts of Congress making up Sec. 44, and are apparently the interpolation of the codifier. In any case they refer to the criminal jurisdiction of the Police Court and the Juvenile Court of the District of Columbia conferred in Chapter 4 and Chapter 6 of the same title (Title 18, Code of the District of Columbia).

The decision of the Court below amounts to holding

that Sec. 43 contains a broader grant of territorial jurisdiction than Sec. 44. It seems to counsel that such a construction is open to considerable argument.

Sec. 44 would seem to be a specific enactment limiting the general terms of Sec. 43, even if "jurisdiction" in Sec. 43 be held to mean "territorial jurisdiction." The well known provision of the Constitution, which Congress must be presumed to have had in mind when it enacted Sec. 43, above, that the trial of crimes should be in the State wherein the crime was committed, is a strong indication that Congress did not intend "jurisdiction" in Sec. 43 to refer in any way to territorial jurisdiction but used it to indicate the *class* of cases over which the court should have power. Congress must be presumed to have legislated with regard to the general rule prescribed by the Constitution that the trial of crimes shall be in the State and district wherein the crime was committed rather than with reference to the possible exception of a waiver (not then judicially sanctioned) of that rule by a defendant. The total absence of a general Federal venue statute relative to crimes is likewise a strong indication that Congress considered the constitutional provisions so clear as to render unnecessary specific legislation territorially limiting the criminal jurisdiction of the District Courts. The statement by the Court below in its opinion

> "Except, therefore, that the Constitution provides the venue for trial of offenses against the laws of the United States, *there is nothing otherwise to prevent the enactment by Congress of a law* permitting and providing for the trial of criminal cases anywhere within the United States."

raises the serious question, independently of what counsel believe to be the controlling provisions of Sec. 44 above, and even if a waiver be conceded, as to whether Congress has, in point of fact, conferred extra-territorial jurisdiction on the Supreme Court of the District of Columbia. The only possible basis, as seen above, for that contention, is the construction of the Court below that "jurisdiction" in Sec. 43 means "territorial jurisdiction" instead of obviously meaning jurisdiction of the *subject-matter*.

It will come as a considerable surprise to practioners before the Supreme Court of the District of Columbia and possibly to the Court itself to hear that that Court has jurisdiction to try defendants upon indictments alleging offenses committed in States such as Montana, Wisconsin, Maine or New Mexico, provided the defendant "waives" his "right" to be tried in the place where the indictment alleges the offense was committed.

For the convenience of the Court there is attached hereto, as Appendix I, the legislative history of Sec. 43 and Sec. 44 of the District of Columbia Code, from which it will be seen that Sec. 44 is a specific enactment limiting the general provisions of Sec. 43.

It may be noted that this Court has already held in *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214, that the jurisdiction of the Supreme Court of the District of Columbia in criminal matters is limited to jurisdiction "*to hear and punish crimes and offenses committed within the District.*"

## CONCLUSION.

It is respectfully submitted that the petition herein should be granted and the judgment below reversed.

Respectfully submitted,

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## APPENDIX I.

The Code of the District of Columbia (complete to March 4, 1929), title 18, sec. 43 provides:

> "43—*Jurisdiction; Powers of Circuit and District Courts Conferred.*—The said Court shall possess the same powers and exercise the same jurisdiction as the District courts of the United States, and shall be deemed a court of the United States." (Mar. 3, 1863, 12 Stat. 762, c. 91; Mar. 3, 1901, 31 Stat. 1199, c. 854, sec. 61; June 30, 1902, 32 Stat. 522, c. 1329; Mar. 3, 1911, 36 Stat. 1167, c. 231, sec. 289.)
>
> "44.—*Same; General Jurisdiction.*—Said court, except as otherwise provided in this title, shall have cognizance of all crimes and offenses committed within said District and of all cases in law and equity between parties, * * *."

Section 43 above was derived from the Act of March 3, 1863, 12 Stat. 762, c. 91, which established the Supreme Court of the District of Columbia, and provided that any one of the Justices thereof might hold special terms of the said court. Section 3 then provides:

> "Sec. 3. * * * * Any one of said Justices may also hold a criminal court for the trial of all crimes and offenses *arising within said District*, which court shall possess the same powers and exercise the same jurisdiction now possessed and exercised by the Criminal Court of the District of Columbia."

The "Criminal Court of the District of Columbia" referred to in the last sentence above was originally constituted by the Act of February 27, 1801 (Davis' Laws, District of Columbia, 1831, p. 124), Sec. 5 of which reads as follows:

> "Sec. 5. *Be it further enacted*, That said court

shall have cognizance of all crimes and offenses *committed within said District*, and of all cases in law and equity, etc."

The "criminal" court was constituted and named as such by Sec. 1, Chap. 128 of the Revised Code of the District of Columbia, 1857, Revision of Ould and Cross, Sec. 4, provided as follows:

"Sec. 4. The Criminal Court shall, except when otherwise expressly provided by law, have exclusive jurisdiction in the trial and punishment of all crimes and offenses *committed within the District.*"

Returning to the amendments to Sec. 43 above, the Act of March 3, 1901, 31 Stat. 1199, c. 854, Sec. 61, provides:

"Sec. 61. *Jurisdiction.*—The said court shall possess the same powers and exercise the same jurisdiction as the Circuit and District Courts of the United States, and shall be deemed a court of the United States, and shall also have and exercise all the jurisdiction possessed and exercised by the Supreme Court of the District of Columbia at the date of the passage of this Code."

This provision was further amended by the Act of June 30, 1902, 32 Stat. 522, c. 1329, by adding after the words "District of Columbia" in Sec. 61 above, the words:

"Under the Act of Congress, approved March 3, 1863, creating that court, and."

The last amendment to this section made by the Act of March 3, 1911, 36 Stat. 1167, Chap. 231, Sec. 289, is simply the familiar statute abolishing the Circuit

Courts and providing for the transfer of their records to the District courts.

Sec. 44 was originally Sec. 763 of the Revised Statutes relating to the District of Columbia and read as follows:

> "Sec. 763. Any one of the Justices may hold a criminal court for the trial of all crimes and offenses *arising within the District.*"

This section was amended by the Act of February 27, 1877, 19 Stat. 253, c. 69, Sec. 2, as follows:

> "Section seven hundred and sixty-three is amended by striking out said section and inserting in lieu thereof the following as section seven hundred and sixty-three;"
>
> "Said courts shall have cognizance of all crimes and offenses *committed within said District* and of all cases in law and equity between parties * * *."

A further amendment was made by Act of March 3, 1901, 31 Stat., p. 1202, Sec. 83, reading as follows:

> "Sec. 83. *The Criminal Court.*—The trial of crimes and misdemeanors *committed in the District of Columbia* shall be in the Supreme Court of the District of Columbia holding a special term as a criminal court, * * *."

As above noted, the words "except as otherwise provided in this title" in Sec. 44 above, refer to the criminal jurisdiction of the Police Court and the Juvenile Court of the District of Columbia, conferred in Chap. 4 and Chap. 6 of this title. The words "except as otherwise provided in this title" are not found in any of the Acts of Congress from which Sec. 44 is derived and are apparently the addition of the codifier.

(Italics throughout are those of counsel herein.)